When Counsel suggested to him the possibility of one first removing some of the cannabis resin by light thrashing for his own purposes before marketing the plant material for the same price, in order to secure higher profits, he was unable to answer.

In my earlier decision, I had dealt with the same issue of extraction of cannabis resin at length *vide* my written judgment date 27 November 1992. On basically the same comments I had made therein in respect of the evidence of the chemist and for the further reasons I have stated hereinabove, I hold that PW1's assertion that he found in P6A and P9A, cannabis as defined in the Dangerous Drugs Act is not sustainable by his evidence, when considered in its entirety, and is devoid of any rational or scientific basis and most importantly, neither is it based on results of any or any proper analysis by him on the crucial issue of the non-extraction of cannabis resin.

As such, an essential ingredient of the charge, that the plant material in P6A and P9A seized on 22 January 1991 was cannabis as defined under the definition (governing the instant case) in s. 2 of the Act has not been made out by the prosecution at the end of the prosecution case. This essential ingredient of the charge being absent, would, even if unrebutted by the defence (say, should the accused remain silent when called to enter upon his defence), not warrant a conviction.

On the grounds aforesaid and pursuant to s. 180 of the Criminal Procedure Code, I hereby acquit and discharge the accused without calling him to enter upon his defence.

PUBLIC PROSECUTOR

v.

LEE ENG KOOI

HIGH COURT, PENANG
TUAN VINCENT NG KIM KHOAY JC
[CRIMINAL TRIAL NO. 47-45-88]
31 MARCH 1993

CRIMINAL LAW & PROCEDURE: Charge of unlawful possession of fire-arms - Prosecution failing to tender police report of raiding officer - Material contradictions between evidence of prosecution witnesses and contents of report - Effect - Whether charge proved.

EVIDENCE : Police report - Whether within the purview of ss. 91 & 92 Evidence Act 1950 - Whether parol evidence can be admitted to contradict, vary or subtract from its terms.

The Accused was charged with being in possession of fire-arms without lawful excuse contrary to s. 57(1)(a) of the Internal Security Act 1960. The prosecution led evidence to the effect that the fire-arms the subject matter of the charge were recovered from a bag held by the Accused.

Upon the application of the defence, the prosecution tendered the police report, made by the officer who led the raid, as an exhibit. The report was made contemporaneously with the raid and the contents of the report disclosed that the fire-arms were in fact found in a closed black steel cylinder in the premises occupied by the Accused and not on the Accused's person as stated by the prosecution witnesses.

[Ed. Note: The following paras of the headnote were provided by His Lordship Vincent Ng Kim Khoay JC]

Held:

[1] The complete removal of the original provision in s. 113 (1) of the Criminal Procedure Code by virtue of Act A324 has the effect of clearly and decisively removing the pre-amendment distinction between first information and non-first information police reports.

[2] The only residual distinction that remains is that whereas a first information report may be tendered and admitted in evidence under s. 108A of the Criminal

Procedure Code, if only due to its value for the purposes of comparing its material with subsequent materials derived from investigations ensuing the first information report, it is nevertheless impermissible to read s. 35 and s. 157 of the Evidence Act as permitting the prosecution to use statements made and recorded after investigations have commenced, be it in the form of police reports or otherwise, e.g. non-first information reports, to corroborate the testimony of a witness.

[3] A police report is the sort of document which s. 107 (i) of the Criminal Procedure Code says has to be reduced to writing, and as such it is clearly a document in writing within the purview of s. 91 and 92 of the Evidence Act, which excludes the admission of parol evidence for the purpose of contradicting, varying or substracting from its terms.

[4] The contents of PW3's police report and his oral evidence in Court both cannot be true. If the police report his false then PW3 may be charged under s. 182 of the Penal Code for having lodged a false report and if his oral evidence in Court is false he may be charged under s. 194 of the Penal Code for having given false evidence. Such evidence which would attract a criminal charge against the witness in either event aforesaid could not he used to found a *prima facie* case against the Accused.

[5] If in a case the prosecution leads two sets of evidence, each one of which contradicts and strikes at the other and shows it to be unreliable, the result would necessarily be that the Court would be left with no reliable and trustworthy evidence upon which the conviction of the accused might be based. Inevitably, the accused would have the benefit of such a situation.

[6] Offering and making available witnesses to the defence by the prosecution is for the sole purpose of avoiding the invocation of s. 114 (g) of the Evidence Act by the defence, and not to enable the prosecution to discharge the burden, incumbent upon them throughout the case, to prove the essentials of the charge, including the fact that the exhibits produced in Court are the exhibits seized from the accused that is, an unbroken chain of handling of the material exhibits.

[7] It is appropriate here to remind DPPs as well as Counsel to conduct their cases before the Courts, with stout confidence in their own wit and grit and command of the facts and the language rather than by guise and guile, unworthy of their role as officers of the Court.

[8] Public interest consideration demands that criminals be apprehended, rightly charged, fairly tried, justly convicted and appropriately sentenced. It is only through an interplay of good law officers, honest but able DPPs, ethical lawyers and competent Magistrates and Judges that these essential links in the administration of justice and maintenance of law and order is ensured for society; a shortfall in any of these links hardly serves public interest.

[Accused acquitted and discharged without calling him to enter upon his defence].

Cases referred to:

Pendakwa Raya v. Lee Hoay Chun, Penang High Court Cr. Trial No. 47 (58) - 13-88 ***(refd)***

Wai Chan Leong v. PP [1989] 2 CLJ 1168 ***(refd)***

Das v. Weston 16 CWN ***(refd)***

PP v. Foong Chee Cheong [1970] 1 MLJ 97 ***(refd)***

Ah Mee v. PP [1967] 1 MLJ 220 ***(refd)***

PP v. Ibrahim bin Arifin [1993] 2 CLJ 529 ***(foll)***

Pavone v. Public Prosecutor [1986] 1 MLJ 72 @ 74 ***(foll)***

PP v. Mohamed Noor bin Jantan [1979] 2 MLJ 289 @ 290 ***(refd)***

Haw Tua Tau v. PP [1981] 1 CLJ 123 / [1981] 2 MLJ 49 ***(refd)***

Munusamy v. PP [1987] 1 CLJ 250 / [1987] 1 MLJ 492 ***(refd)***

PP v. Peter Yeoh & Anor. [1993] 1 CLJ 78 ***(foll)***

Abdullah Zawawi v. PP [1985] 2 CLJ 2 / [1985] 2 MLJ 16 ***(refd)***

PP v. Yap Boon Chang [1992] 2 CLJ 1257 ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 107(i), 108A, 113, 180

Evidence Act 1950, ss. 35, 91, 92, 114(g), 157

Internal Security Act 1960 (Revised 1972) s. 57(1)(a) & (b)

Penal Code, ss. 182, 194

For the Public Prosecutor - Kamardin bin Hashim (Ahmad Shahrir bin Mohd Salleh with him), DPP's

For the Accused - V. Sithambaram (M. Athimulan with him); M/s. Kumar, Sitham & Co.

JUDGMENT

Vincent Ng Kim Khoay JC:

The Accused was charged as follows:

1st Charge:

That you on 6 October 1986 at about 6.50 a.m. at a house No. 451-P, Jalan Pokok Cherry, Air Itam, in the District of Georgetown, in the State of Penang, within security area as proclaimed by the Yang di Pertuan Agung *vide* P.U.(A) 148 dated 15 May 1969, without lawful excuse did have in your possession fire-arms, to wit, one .38 Smith and Wesson Special revolver bearing No. (Yoke) 51327 mod. 10-5, one .38 Smith and Wesson Special revolver bearing No. (Yoke) 67601 mod. 10-5, and one .38 Smith and Wesson Special Revolver bearing No. 24152, without lawful authority, that you have thereby committed an offence under s. 57(1)(a) of the Internal Security Act 1960 (Revised 1972) and punishable under s. 57(1) of the same Act.

2nd Charge:

That you on 6 October 1986 at about 6.50 a.m. at a house No. 451-P, Jalan Pokok Cherry, Air Itam, in the District of Georgetown, in the State of Penang, within security area as proclaimed by the Yang di Pertuan Agung *vide* P.U.(A) 148 dated 15 May 1969, without lawful excuse did have in your possession ammunitions, to wit 86 rounds of .38 inch Special without lawful authority, and that you have thereby committed an offence under s. 57(1)(b) of the Internal Security Act 1960 (Revised 1972) and punishable under s. 57(1) of the same Act.

At the opening speech of the learned Deputy Public Prosecutor, Encik Kamardin bin Hashim (assisted by Encik Ahmad Shahrir bin Haji Mohd. Salleh) stated that the prosecution would prove both the charges by direct and circumstantial evidence.

The prosecution called two material and principal witnesses, being ASP Sat Pal Jain s/o Churanji Lal (PW3) and Insp. Tan Boon Hooi (PW9).

PW3 stated that on 6 October 1986 at 6.50 a.m. he led a police raiding party to raid a house No. 451-P, Jalan Pokok Cherry, Air Itam, Pulau Pinang (hereinafter called the said house) together with 16 other police officers including PW9. He and the said members of the raiding party entered the compound of the said house through the front gate of the fence which was (until then) closed but not padlocked. When they entered the house compound PW3 saw, on the right at a distance of approximately 12 to 15 feet away from him, a male Chinese (identified as the Accused) walking towards him to the said front gate while at the same time holding a grey bag (identified as P4) in his right hand. As soon as the Accused saw the police raiding party he tried to escape and PW3 and the other officers of the raiding party shouted "Berhenti, Polis! Polis" while they chased after the Accused. PW3 together with three other raiding officers then apprehended the Accused after some struggle which resulted in the singlet worn by the Accused being torn, blood stained and divested from his person. The moment the Accused was caught, P4 which he was then holding fell onto the floor and he was then immediately handcuffed.

P4 was then examined in front of the Accused and when the bag was unzipped they found the following items:

(1) a glucose tin (P5) within which contained one yellow plastic bag (P5 (A) which held 39 live bullets of .38 special calibre (P5 (B)).
(2) one dark blue coloured sock (P6) which held 15 live bullets of .38 special calibre (P6 (C)).
(3) one grey coloured sock (P7 (A)) which held 18 live bullets (P7 (C)) of a .38 special calibre.
(4) one white coloured sock with blue stripes (P8 (A)) which held 14 live bullets of a .38 special calibre (P8 (C)).
(5) one blue coloured sock (P9 (A)) which held one Smith & Wesson Special revolver bearing serial No. 51327 (P9 (C)).
(6) one blue coloured sock (P10 (A)) which held one Smith & Wesson Special revolver bearing Serial No. 67601 (P10 (C)).
(7) one white coloured sock (P11 (A)) which held one Smith & Wesson Special revolver bearing Serial No. 24152 on its butt (P11 (C)) .
(8) one pair of handcuffs of "Super - K" brand (P14).

This witness also said, to quote: "Tiada lain-lain barang kes dijumpai dalam P4". PW3 also found and arrested 4 females in the said house, who were the wife and three children of the Accused. He subsequently conducted a

search of the said house and found no incriminating items therein.

ASP Hasni bin Hitam Sopki (PW6), a firearms expert, testified that the aforesaid three revolvers [P9(C), P10(C) and P11(C)] were serviceable and dischargeable and the 86 bullets [P5(B), P6(C), P7(C) and P8(C)] were live and usable bullets. Neither his expertise nor his findings were challenged by the defence.

PW3 however said that at about 9.00 a.m. on the same day, following a search in the compound outside the said house, Sgt. Ramli found a black steel cylinder closed with lid (identified as (D22)) which contained one pistol, two revolvers and 109 bullets, the details of which was elicited from PW9 as follows:

(i) one white coloured sock (D23) which held one Llama 11 pistol of 9 mm .38 calibre (with serial number erased) with one empty magazine [the pistol together with the magazine marked as D23(A)].
(ii) one white coloured stock (D24) which held one Smith & Wesson revolver of .38 calibre bearing serial No.CTG 41914 (D24 (A)).
(iii) one white coloured sock (D25) which held one Smith & Wesson special revolver bearing serial No. CTG 54685 of .38 calibre (D25 (A)).
(iv) together with 109 bullets.

Both these witnesses namely PW3 and PW9 corroborated each other in material particulars, particularly that P5(B), P6(C), P7(C) and P8(C) (that is, totaling 86 of .38 special live bullets) and P9(C), P1O(C) and P11(C) (the three .38 Smith & Wesson special revolvers) were found in the grey bag (P4) held by the Accused in his right hand when he was apprehended. The only divergence in evidence between these two witnesses being that PW9 included two further exhibits namely a pair of black long pants (P19) and a handkerchief (P20) as part of the contents of P4, whereas PW3 categorically asserted in his examination-in-chief that nothing else was found therein besides the items he had enumerated in his evidence.

PW3 also said he lodged a police report being Air Itam Police Station Report No. 2440-1/86 (P27) at 12.30 p.m. on the said day that is, 6 October 1986 (only put in as a prosecution exhibit subsequently, when he was recalled). When PW3 was asked by defence Counsel in cross-examination whether he had refreshed his memory with this report, he admitted as follows, to quote him: "Sebelum saya memberi keterangan saya ada membaca statement dan laporan polis - laporan polis saya membuat pada 6 October 1986 pukul 12.30 petang". When this witness was recalled by the prosecution in order to tender P27 he again stated under cross-examination "Sebelum dan semasa saya memberi keterangan dalam Mahkamah saya telah dan ada merujuk kepada P27."

When, in cross-examination, PW9 denied the question put to him by Mr Sithambaram that the contents of P4 were in fact found in D22 at the compound outside the said house and not in P4, Counsel immediately applied for an order of this Court that a copy of P27 be supplied to him by the prosecution to enable him to cross-examine this and other witnesses if it became necessary. This was objected to by the learned DPP Encik Kamardin and the Court's ruling was as follows:

> The complete removal of the original provision in s. 113 (1) of the CPC by virtue of Act A324 which states: "No statement made by any person ... in the course of a police investigation ... shall ... be used as evidence" and its replacement with a new provision which states: "Where any person is charged ... any statement ... by that person ... shall be admissible in evidence .... and ... may be used in cross-examination for the purpose of impeaching his credit" - the latter provision concerns and pertains only to any person who is charged as opposed to the earlier generalised provision - has the effect of clearly and decisively removing the pre-amendment distinction between first information and non-first information police reports.
>
> There is thus no justification for the refusal by the learned DPP to supply a copy of PW3's report to the defence on the ground that same is not a first information report or for any other reason; it being also, a public document by virtue of s. 35 of the Evidence Act. See *Pendakwa Raya v. Lee Hoay Chun* (Penang High Court Cr. Trial No. 47 (58)-13 -88) and *Wai Chan Leong v. PP* [1989] 2 CLJ 1168 at p. 1171 col. E Rt.

The only residual distinction that remains is that whereas a first information report may be tendered and admitted in evidence under s. 108A of the Criminal Procedure Code, if only due to its value for the purposes of comparing its material with subsequent materials derived from investigations ensuing the first information report, it is nevertheless impermissible to read s. 35 and s. 157 of the Evidence Act as permitting the prosecution to use statements made and recorded after investigations have commenced, be it in the form of police reports or otherwise, e.g.. non-first information reports, to corroborate the testimony of a witness.

It is patently unfair to the accused persons and unjust to allow subsequent or non-first information reports detailing and setting out materials derived from an investigation, initiated and set into motion by a first information report, to be used for corroborative purposes. The reason being that the contents of such subsequent reports would obviously be made to dovetail with materials in the case as has then developed. The import of the underscored words in the expression "... before any authority legally competent **to investigate the fact...**" in s. 157 of the same Act fortifies this view. See *Das v. Weston* 16 CWN; *PP v. Foong Chee Cheong* [1970] 1 MLJ 97 and *Ah Mee v. PP* [1967] 1 MLJ 220.

Although P27 could not be and was not put in for corroborative purposes, as soon as it was put in as a prosecution exhibit, it became substantive evidence and liable to be commented upon by the defence as regards the consistency and truthfulness of PW3.

As the Court held the view that it was imprudent to take a peep into the contents of P27 before making a ruling on Counsels' application, neither the Court nor Counsel were then aware of the gathering thunderstorm that P27 generated in its wake.

Just a week earlier this Court had allowed a similar application by the defence in another case based upon the same principles. However, Counsel therein could make nothing of the copy of the police report supplied to him pursuant to my ruling in his favour. See *PP v. Ibrahim bin Arifin* [1993] 2 CLJ 529

Following the Court's order that the copy of P27 be supplied to the defence the learned Deputy Public Prosecutor recalled PW3 and formally tendered P27 as an exhibit. He then asked PW3 to explain the very material discrepancy between his oral testimony and P27. This was strongly opposed by Mr. V. Sithambaram, though the latter did not object to the tendering of P27 *per se* as an exhibit for obvious reasons.

After hearing submissions by both parties, the Court upheld Counsel's objection on the following grounds:

(1) A police report is the sort of document which s. 107 (i) of the Criminal Procedure Code says has to be reduced to writing, and as such it is clearly a document in writing within the purview of s. 91 and 92 of the Evidence Act, which excludes the admission of parol evidence for the purpose of contradicting, varying or substracting from its terms.

(2) Section 91 of the Evidence Act applies equally to criminal trials no less than civil proceedings. See *Ah Mee v. PP (ibid)* at p. 222 - at I left col. to, C Rt col. and p. 223 at A left column. This case had also been cited with approval in *Pavone v. Public Prosecution* [1986] 1 MLJ 72 at p. 74 H left column wherein Edgar Joseph Jr. J. (as he then was) had said, to quote:

> This in turn would bring into play s. 91 of the Act which applied as much to criminal as to civil proceedings. So far as material to this case, it provides, 'In all cases in which any matter is required by law to be reduced to the form of a document no evidence shall be given in proof of the terms .... of such matter except the document itself.' Similarly, s. 92 of the Act would operate to exclude all parol evidence seeking to contradict or vary what was set out in writing.

(3) It was not a case where the learned Deputy was applying to impeach PW3.

(4) PW3 had also stated that he had not only refreshed his memory with P27 before he testified, but indeed he made several requests to refer to and was in fact staring at the report while he gave evidence. He could and should have then revealed the discrepancy and enlightened the Court then if any explanation was needed.

As the prosecution had tendered P27 it ought to be taken to rely on its contents as part of

its case and also to invite comments thereon by the defence.

The comments and my findings being:

(A) On the First Charge

P27 clearly disclosed that the subject matter of the first charge being the 3 revolvers, were never found in P4. This would mean that the Accused was not, as alleged in the oral testimony of the witnesses, caught red-handed with the three revolvers being exhibits P9 (C), P10 (C) and P11 (C) but rather these three revolvers were found outside the house encased in D22. PW3 said "Di sekitar kawasan luar rumah, Sgt. Ramli jumpa satu cylinder besi yang mengandungi satu pistol, dua revolver dan 109 butir peluru".

It was submitted that P27 was lodged by PW3 as complainant in the case. It was this report that caused the opening of investigation papers. It was a detailed report concerning the manner of arrest and the exact items seized, with serial numbers, calibre and make, etc. of the five revolvers and one pistol, and therefore a complete report of the respective contents of P4 and D22.

PW3 said that a detailed search of P4 was carried out inside the said house. This was when he also noted the serial numbers of the three revolvers and counted the 86 bullets as the exhibits were arranged therein, and this was confirmed by PW9. The police photographer (PWl) tendered the photographs P2 (F) & (G) showing P4 and its contents.

When the Court considers the parol evidence of PW3 and PW9 and the photos P2 (F) and P2 (G) *vis-a-vis* the statements in P27, the Court finds that there is an acute and material contradiction between them in regard to the exhibits found in P4.

According to P27 the Accused was not arrested with the three revolvers P9 (C), P10 (C) and P11 (C) in P4 (the subject matter of the first charge) but these three revolvers were found in D22. It is thus my finding that P27 had the effect of demolishing and rebutting the oral evidence of PW3 and PW9 as well as the photographs P2 (F) and P2 (G) for the purposes of s. 180 of the Criminal Procedure Code. *PP v. Mohamed Noor bin Jantan* [1979] 2 MLJ 289 at p. 290 C Lt. column.

Furthermore, Sgt. Ramli was not called to enlighten the Court as to whether the said three revolvers were found in P4 or D22. It is thus inherently incredible for the three said revolvers to be found in two places that is, in P4 (a grey bag) and also in D22 at the compound outside the house. See *Haw Tua Tau v. PP* [1981] 2 MLJ 49 and *Munusamy v. PP* [1987] 1 MLJ 492. Credible evidence on the first charge is thus lacking and the charge cannot stand as it has not been made out that the subject matter of the charge were in the possession of the Accused.

(B) On the Second Charge

The statements in P27 would imply that besides all the bullet-exhibits, namely P5 (B) (39 live bullets), P6 (C) (15 live bullets), P7 (C) (18 live bullets) and P8 (C) (14 live bullets) totalling 86 bullets, 83 other live bullets were also found in P4 (making a grand total of 169 bullets) but none were found in D22. The dilemma is that whereas P27 says that 169 bullets were found in P4, both PW3 and PW9 testified that 86 bullets were found in P4 and 109 bullets were found in D22, thus making a grand total of 195 bullets recovered on that day. It is impermissible for the Court to amend the second charge from 86 bullets to 195 bullets as both of the said witnesses had not said that the accused was also in possession of the 109 bullets found in D22 and the same were not produced, identified or marked. It also follows that since the 109 bullets were not produced and marked separately the Court would not be able to ascertain whether a portion or all of the 86 bullets came from the 109 bullets found in D22.

By the same token, even on the basis of P27, as the balance 83 bullets allegedly found in P4 were not produced in Court and marked, the Court cannot amend the second charge from 86 bullets to 169 bullets in as much as the Court would not know the identity of the 83 bullets allegedly found in P4 according to P27.

This is quite apart from the implication that the two versions, in P27 as opposed to their oral testimony on the total bullets recovered on that day, would leave 26 bullets unaccounted for.

The contents of P27 and the oral evidence of PW3 and PW9 both cannot be true. If P27 is false, then PW3, could be charged under s. 182

of the Penal Code for having lodged a false report punishable with imprisonment for a term which may extend to 6 months and if the evidence of PW3 and PW9 in this Court in the capital charge is false, they shall be liable to he charged under s. 194 of the Penal Code punishable with imprisonment for a term which may extend to 20 years and if they have given or fabricated false evidence, intending thereby to cause the Accused to be convicted of an offence which is capital, they shall be punished either with death or the punishment hereinbefore described.

Could such evidence which would attract, a criminal charge against the witness in either event aforesaid, be used to found a *prima facie* case against the accused? My answer is in the negative.

The prosecution has called PW3 and PW9 as witnesses of truth and as their evidence has not been impeached, their contradiction in respect of revolvers seized and gross inconsistencies in respect of the bullets when considered in conjunction with P27, remains. This Court holds that they had lied on facts which are verifiable and consequently what credence could be attached to their testimony on facts which are not verifiable?

In his reply, the learned Deputy Public Prosecutor Encik Kamardin also admitted that the evidence adduced in Court amounted to two versions of the prosecution case.

The function of the Court in a criminal trial is to find whether the person arraigned before it as the accused is guilty of the offence with which he is charged. For this purpose the Court scans the material on record to find whether there is any reliable and trustworthy evidence upon the basis of which it is possible to found the conviction of the accused and to hold that he is guilty of the offence with which he is charged. If in a case the prosecution leads two sets of evidence, each one of which contradicts and strikes at the other and shows it to be unreliable, the result would necessarily be that the Court would be left with no reliable and trustworthy evidence upon which the conviction of the accused might be based. Inevitably, the accused would have the benefit of such a situation.

I have also found in the prosecution case the following infirmities and unsatisfactory features which makes it unsafe for me to call the Accused to enter upon his defence, though this finding pales in comparison with my above findings in respect of Counsels' complaints as in (a) and (b) below.

(i) PW3 said that he took with him all the exhibits found on that day some time after 9.00 am and he lodged a police report at 12.30 pm on the same day. There was no evidence as to where he kept the exhibits and who guarded them during this interval, considering that they were not light exhibits.

(ii) The bullets recovered from P4 and from D22 (as per oral evidence) were not individually marked to distinguish the two respective recoveries; the 86 and 109 bullets have not been kept in separate envelopes or sealed or marked and neither was there evidence that they were kept separately until about 11.00 am on the following day when it was handed to the I.O. Tan Kok Liang (PW2). See *PP v. Peter Yeoh & Anor*. [1993] 1 CLJ 78.

(iii) Insp. Seah Chong Beng who took out and returned a particular revolver three times and who was also the officer who collected all the exhibits from PW8 and who handed them to PW4, was not called but merely offered.

Offering and making available witnesses to the defence by the prosecution is for the sole purpose of avoiding the invocation of s. 114 (g) of the Evidence Act by the defence, and not to enable the prosecution to discharge the burden, incumbent upon them throughout the case, to prove the essentials of the charge, including the fact that the exhibits produced in Court are the exhibits seized from the Accused that is, an unbroken chain of handling of the material exhibits. See *Abdullah Zawawi v. PP* [1985] 2 MLJ 16.

(iv) The torn blood stained singlet which the Accused was alleged to have worn at the time he was caught (to show the manner he was caught as claimed) was neither recovered nor produced as an exhibit.

Counsel Mr. Sithambaram prepared his submission of no case to answer with truly uncommon passion and addressed the Court at length with equal vigour.

The main thrust of the submission - nay, complaint - was that, to quote him:

(a) *In regard to the two witnesses;*

> P27 has afforded the Court to hold that PW3 and PW9 were lying through their teeth. If the police report is a false report he is chargeable under s. 182 of the Penal Code and if their evidence in a capital case is false he is chargeable under s. 194 of the Penal Code punishable with 20 years imprisonment; then such evidence cannot possibly found a *prima facie* case under s. 180 of the CPC and,

(b) *In regard to the conduct of the two DPPs, he had this to say;*

> I seriously submit that there has been a very deliberate and material suppression of evidence by the learned DPPs in that P27 was not introduced by the prosecution when PW3 gave evidence contradicting his police report which was in the hands of the prosecution. Their conduct gave me sleepless nights. P27 could not have come to light if the Court had not ordered a copy of P27 to be supplied. Had the report not been produced it would have caused a gross miscarriage of justice. The prosecution had sought to produce P27 for, clarification purposes only after they were caught with their pants down.

These words rang loud with reverberations and inevitably called for this Court's comments. With respect I have found transgressions by the two witnesses and the DPPs precisely as alleged by Mr Sitham based on the evidence presented and the sequence of the presentation of P27.

In regard to complaint (a):

In view of PW3's admission that he had reviewed his report (P27) before he gave evidence and had also on occasion even referred to same while he was examined and pointedly cross-examined on the contents of P4 and D22 respectively, he had indeed given evidence in an unethical manner and had utterly discredited himself as a witness. It was virtually tantamount to seeing white in his report while saying black. The Court views with abhorrence the cavalier manner in which PW3 had held out to the Court that what he was seeing was what he was saying, and without disclosing, at that material time, the gross discrepancies in what he saw in P27. P27 states, *inter alia*, that the three revolvers were found in the black metal cylinder (D22) outside the said house, but yet he testified that same were found in the grey bag (P4) that the Accused was holding when apprehended. He had thus intentionally misled the Court. As PW9 must have been aware of the contents of P27, his evidence is equally discreditable for having chosen to corroborate and support PW3's evidence in almost every detail.

If PW3's testimony in Court was the truth and his report (P27) was untrue, it is most incredible that he had not lodged a corrective report containing materials which accords with his oral evidence, contemporaneously with the lodgement of P27. Had a contemporaneous and corrective report been lodged it could and would have been tendered as an exhibit together with P27 by the learned DPPs without running the gauntlet of s. 91 of the Evidence Act and the authorities aforesaid. Obviously this was not done, as probably there was nothing then to correct.

As P27 is a report lodged on the day of the offence, it is far more likely that all the offending items in the first and second charge as well as the two other revolvers D24A and D25A and a pistol D23A together with all the bullets recovered on that day were found in the black steel cylinder (D22) outside in the house compound and not on the person of the Accused. The basic foundation of the prosecution case, that the Accused was caught red handed with P4 containing the offending items while walking away from the house soon after he saw the raiding party arrive, thus crumbles.

Counsel also submitted that the outrageous conduct of the two Senior Police Officers in the present case was evocative of my poignant observation in an earlier case where, in acquitting the accused - after having found that evidence of possession against him had been fabricated - I had said "Even three senior police officers acting in concert and talking in near perfect harmony on certain material details in their evidence though - drawing a blank on other pertinent details, as appeared to be the case here - should not, in the interest of justice, be allowed to claim exclusivity or monopoly to the truth without submitting to the Court's overriding duty to examine every

detail in their evidence with the view to testing their veracity in conjunction with the rest of the evidence in their totality." There was no appeal from this decision. See *PP v. Yap Boon Chang* [1992] 2 CLJ 1257.

It cannot be gainsaid that it becomes that much more difficult for the Court to steer to a just decision in a battle of two versions of lies between liars who had shown scant regard for the truth and the sanctity of the solemn oath that they have taken in Court. Surely, in the public interest, a higher standard of conduct is expected of police officers especially when giving sworn evidence in Court. In as much as it is in the essential interest of the public that criminals should he caught and put away from their nefarious activities, it is equally essential for law enforcers to demonstrate that they stand on a higher moral plane than the criminals that they sought to put away; they must be mindful of the fact that the law abiding public too would have to deal with them from time to time and *vice versa* and they cannot function *in vacua*.

In regard to complaint (b)

It is conduct unseeming and wholly incredible that the learned DPPs, being fully aware of the contents of P27 and keenly appreciating the ramifications of the material piece of oral evidence as it tumbled out from PW3, did not at that point in time and of their own volition, promptly throw in P27 at PW3 and sought to seek clarification from him. This would have avoided their skirmish with s. 91 of the Evidence Act.

In this case, the learned DPPs had instead held P27 close to their chests; had strongly resisted (though they said, for the record only) the supply of same to Counsel; and had sought to get PW3 to clarify by recalling him and producing P27 **as an exhibit, only after** the Court had ordered the supply of a copy of same to Counsel.

Even if they were then labouring under a mistaken belief that they had the right to refuse supply of a copy of P27 to Counsel, yet their duty to help the Court arrive at the truth and to honour truth itself overrides any lingering ill-founded eagerness that they may habour, to satisfy their superiors that they have robotically objected to the objectable. Surely, the eternal question of which version if any, abides by the truth is solely and exclusively within the domain of judicial determination and not within the purview of Counsel or DPPs.

It is appropriate here to remind DPPs as well as Counsel to conduct their cases before the Courts, with stout confidence in their own wit and grit and command of the facts and the language rather than by guise and guile, unworthy of their role as officers of the Court.

The reaction of Encik Kamardin to Mr. Sitham's complaint, that the two main prosecution witnesses had lied through their teeth in a capital charge against his client, was that he had not coached them to testify the way they had in Court. While it is to their credit that the proceedings disclosed no improprieties by the learned DPPs in this regard, surely their duty to the Court (in as much as the bounden duty of defence Counsel as officers of the Court) would require of them - in the wider interest of justice - more than merely taking heed of the euphemistically expressed caveat not to teach the witness how to tell the truth. Unfortunately, their conduct had given Counsel the impression of suppression of truth.

Public interest consideration demands that criminals be apprehended, rightly charged, fairly tried, justly convicted and appropriately sentenced. It is only through an interplay of good law officers, honest but able DPPs, ethical lawyers and competent Magistrates and Judges that these essential links in the administration of justice and maintenance of law and order is ensured for society; a shortfall in any of these links hardly serves public interest.

I am convinced that we Malaysians are endowed with the correct social ethos and cultural ingredients to display with natural ease, a sense of justice second to none in the world, and without distinction between rank and status, colour or creed, alleged criminal or verified saint. I am sure what has happened in this case is only an aberration.

Considering a State such as Penang which has in recent years seen a rise of crimes of violence involving the use of firearms - indeed, recently two lawyers have been shot here within the span of three months - and it is thus in the imperative interest of the public that gun runners be vigilantly apprehended and dealt

with with the full force of the law, it is utterly regrettable that the Accused should succeed due to the aforesaid gross infirmities in his arrest and prosecution. Obviously the principle adumberated above is more important than the case itself, and so, with considerable regret, this Court has no option but to acquit

PUBLIC PROSECUTOR

v.

NAZARUDIN BIN AHMAD & 2 ORS.

HIGH COURT, KUALA LUMPUR
DATO' DR. VISU SINNADURAI J.
[CRIMINAL TRIAL NO. 45-6-91]
19 MARCH 1993

CRIMINAL LAW AND PROCEDURE: Sentencing - Principles and guidelines - Disparity of sentences for similar offences - Plea of guilty - First and juvenile offenders - Public interest.

The three accused persons were charged in furtherance of the common intention of all of them to commit murder by causing the death of one Francis Adickalam, an offence punishable under s. 302 of the Penal Code. All three accused persons pleaded not guilty and claimed trial. The trial then went on for about 4 days. The prosecution later amended and reduced the charge to one of culpable homicide not amounting to murder, punishable under the first limb of s. 304 of the Penal Code read together with s. 34 of the said Code. All the three accused persons elected to plead guilty to the reduced charge.

Held:

[1] The plea of guilty by the accused is a consideration which should be taken into account in determining their sentence. However, considering the serious nature of the offence the accused persons should be given a discount of one-quarter rather than one-third of the sentence which would be imposed on them had they pleaded not guilty and been found guilty after a long and protracted trial.

[2] It is clear that the first accused played a more active role in the commission of the offence. It was he who had the revolver with him and it was he who fired the fatal shot killing the innocent taxi driver. Though, generally, there should be no disparity of sentences in a case where two or more persons are charged for the same offence, the fact that the culpability of one of them is greater should be borne in mind.

[3] The first and third accused are young, and they are first offenders. In such circumstances, the Court should consider how the length of time spent in prison would affect their own